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No. 93-771

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In the Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL H. HUNT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether notice of an alibi defense, without more, requires the government to prove that an offense charged "on or about" a date in fact occurred on that date.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-10a, is reported at 37 M.J. 344. The opinion of the Army Court of Military Review, Pet. App. 11a-17a, is reported at 34 M.J. 779.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 18, 1993. The petition for a writ of certiorari was filed on November 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Following a general court-martial at Fort Dix, New Jersey, petitioner was convicted of rape, larceny, two counts of assault, adultery, and engaging in conduct of a nature to bring discredit upon the Armed Forces by possessing on a public highway an unlicensed, loaded handgun and hollow-point bullets in violation of New Jersey state law, and by operating a motor vehicle on a suspended license, in violation of Uniform Code of Military Justice (UCMJ) Articles 120, 121, 128, and 134, 10 U.S.C. 920, 921, 928, 934. Petitioner was sentenced to confinement for 14 years, a dishonorable discharge, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the findings and sentence. The Army Court of Military Review set aside the conviction for driving on a suspended license, but otherwise affirmed the findings and the sentence. Pet. App. 11a-17a. Upon discretionary review, the Court of Military Appeals affirmed. *Id.* at 1a-10a.

1. One evening between late September and mid-October 1989, Private Kimberly Cooper and Private Mary Brownell left their company area without authority in order to purchase cigarettes at a local inn. At the inn, the two trainees were approached by petitioner, who ascertained their military status and promised not to report their unauthorized absence. Cooper and Brownell accepted petitioner's offer to give them a ride back to their barracks. Petitioner switched vehicles and made the two trainees remove their military headgear to decrease the likelihood of their being noticed. He drove to a liquor store, parked the car, covered the windshield with a visor, and drank alcoholic beverages in the parked car with the trainees. Pet. App. 3a.

Petitioner told the trainees that he was in the military and said he was "in intelligence." At one point, petitioner leaned over and kissed Cooper, who was surprised but did not resist. Petitioner subsequently drove the trainees to a parking lot near their barracks and suggested that Brownell check to see if the barracks door was locked for the evening. Cooper told Brownell she would soon follow. Pet. App. 3a-4a.

Once Brownell was gone, petitioner and Cooper resumed kissing. Petitioner unbuttoned Cooper's pants and began fondling her genital area. He then moved to her side of the car, put his weight on her chest, trapped her arms and said, "[j]ust let me stick it in." Cooper repeatedly said "no" and told petitioner to get off her. As she cried and implored him to stop, petitioner forced himself on her and had sex with her. Pet. App. 4a.

Brownell returned to the vehicle ten minutes later and knocked on the tinted window. As she was walking away, Cooper "stumbled out" of the car. Cooper looked disheveled and appeared to be fixing her uniform. Cooper repeatedly exclaimed "Oh, my God" as she ran to the barracks and became physically ill. She lay on her bunk and repeatedly said "Oh, my God. Oh, my God" and "He wouldn't get off, He wouldn't get off. I told him to stop and he wouldn't stop." Cooper later told Brownell that petitioner had had sex with her while she resisted. Pet. App. 4a.

Cooper and Brownell did not report the incident until October 20, 1989. Pet. App. 4a; Tr. 257-258, 291, 339-340. At the preliminary hearing held pursuant to Article 32, UCMJ, 10 U.S.C. 832,[1] Cooper testified that the rape

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[1] Article 32 provides that no charges can be referred to a general court-martial until there has been a thorough and impartial hearing on all matters set forth in the charge. The accused has the

occurred "three o[r] four weeks before [Thanksgiving]." See Art. 32, UCMJ, Investigation Report 6. However, in a sworn statement made on October 20, 1989, which was considered by the Article 32 hearing officer, Cooper reported that the rape had occurred "3 weeks or so" prior to October 20th. GX 4; Art. 32, UCMJ Investigative Report 30. At trial, Cooper was unsure of the precise date of the rape, but estimated that it happened between the middle and the end of October. Tr. 318-319, 338-340. She was resolute in her testimony that, whatever the actual date, the rape occurred three weeks prior to the date that she reported it. Tr. 339-340.

Brownell testified at the Article 32 hearing that the rape occurred in October. Art. 32, UCMJ, Investigation Report 10. At trial, she testified that the incident happened three weeks earlier than the date she made her sworn statement on October 20, 1989. Tr. 291; Pet. App. 8a-9a & n.2. Other witnesses placed the date of the rape between late September and late October. Tr. 233, 243-245.

2. Prior to trial, defense counsel gave notice of an alibi for October 20, 1989, as required by Rule 701(b)(1) of the Rules for Courts-Martial. Petitioner presented an alibi from 7:00 p.m. on October 20, 1989, to 2:00 a.m. on October 21, 1989. Tr. 414-419. That was the time of day during which, according to Brownell and Cooper, the

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right to be informed of the charges against him, to be present during the hearing, to be represented by counsel, to be informed of the witnesses that the prosecution expects to call, to be informed of the identity of his accuser, to cross-examine the witnesses, and to present evidence in his defense. He may also present evidence that would mitigate the severity of the offenses. The accused has the right to have defense counsel appointed to assist at an Art. 32 hearing. Art. 38, UCMJ, 10 U.S.C. 838; *Manual for Courts-Martial, United States—1984*, Rule for Courts-Martial 405(f) and (g).

rape occurred. Pet. App. 8a n.2. The court-martial panel members rejected petitioner's defense and found him guilty of raping Cooper.

3. On February 28, 1992, the Army Court of Military Review set aside petitioner's conviction for driving on a suspended license, but affirmed the remaining findings and sentence. Pet. App. 16a-17a. That court held that the variance between the pleading and the proof concerning the rape was not fatal for four reasons: First, the court found that a four-week difference is not sufficiently substantial to imply that petitioner was misled. *Id.* at 14a. Second, the court found "more than ample evidence" to establish that petitioner had notice of the specific incident to which the charge related to enable him to defend against it. *Ibid.* Third, the court found that the finding would protect petitioner from another trial for the same offense. *Ibid.* Finally, the court relied upon the fact that petitioner did not object or otherwise move for appropriate relief or complain about indefiniteness. *Ibid.*

4. A unanimous Court of Military Appeals affirmed on the two issues on which it granted review. Pet. App. 1a-10a. First, it held that there was no material variance since petitioner was charged with rape "on or about" October 20, 1989, and the evidence proved that the rape occurred within three weeks of October 20, 1989. *Id.* at 7a-8a. Second, the court held that even if a material variance occurred, it did not prejudice petitioner. *Id.* at 8a. The court noted that the record does not show that petitioner was surprised by the variance, as the state of the government's proof was readily apparent from the witness testimony and other evidence presented at the Article 32 hearing, at which petitioner was represented by counsel. *Id.* at 8a-9a. The court also observed that petitioner did not move for a more specific charge or request

a continuance to prepare a new defense. *Id.* at 9a. The court concluded that petitioner's "attempt to use his pretrial notice of alibi to bind the prosecution to a date which it did not particularly allege, and then claim surprise, is to no avail." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 4-13) that there was a fatal variance between the date that the rape was charged to have occurred and the date on which it was proved at trial.

1. This Court has long recognized that a charging instrument is adequate so long as it provides the accused notice of the charge and protects him against another prosecution for the same offense. *Berger* v. *United States*, 295 U.S. 78, 82 (1935); see also *Ledbetter* v. *United States*, 170 U.S. 606, 612-613 (1898). Therefore, a charging instrument that alleges that an offense occurred "on or about" a certain date is adequate to put the defense on notice that the charge is not limited to the specific date listed. *United States* v. *Reed*, 887 F.2d 1398, 1402-1403 (11th Cir. 1989), cert. denied, 493 U.S. 1080 (1990); *United States* v. *Leibowitz*, 857 F.2d 373, 378-379 (7th Cir. 1988), cert. denied, 489 U.S. 1088 (1989). So long as the government proves that the crime occurred on a date reasonably close to the date appearing in the charge, there is no material variance as a matter of law unless proof of the particular date is an element of the offense or the defendant is otherwise prejudiced. Pet. App. 7a; *Reed*, 887 F.2d at 1403; *United States* v. *Nersesian*, 824 F.2d 1294, 1323 (2d Cir.), cert. denied, 484 U.S. 957 (1987). Even where the variance is material, a defendant may obtain reversal only on a showing that he suffered substantial prejudice as a result. See, *e.g.*, *United States* v. *Duke*, 940 F.2d 1113, 1119-1120 (8th Cir. 1991); *Nersesian*, 824

F.2d at 1323; *United States* v. *Cochran*, 697 F.2d 600, 604 (5th Cir. 1983); *United States* v. *Arteaga-Limones*, 529 F.2d 1183, 1193 (5th Cir.), cert. denied, 429 U.S. 920 (1976). A defendant is not prejudiced merely because the government is unable to prove the exact date on which an offense occurred and the defendant contends he has an alibi for some part of the period during which the government contends it might have occurred. See *Reed*, 887 F.2d at 1403; *Leibowitz*, 857 F.2d at 378; *United States* v. *Schurr*, 775 F.2d 549, 559 (3d Cir. 1985); *United States* v. *King*, 703 F.2d 119 (5th Cir.), cert. denied, 464 U.S. 837 (1983); *United States* v. *Creamer*, 721 F.2d 342 (11th Cir. 1983). Cf. *United States* v. *Phillips*, 869 F.2d 1361, 1369 (10th Cir. 1988).[2]

2. The Court of Military Appeals' decision in this case is entirely consistent with the above principles. As the court observed, petitioner "was not charged with rape on October 20, 1989, but with rape 'on or about October 20, 1989.'" Pet. App. 7a. Since the evidence showed that the rape occurred within three weeks of October 20, 1989, the court properly found no material variance. *Id.* at 7a-8a.

Moreover, the Court of Military Appeals correctly held that the record in this case demonstrated that petitioner suffered no prejudice from the reference to Octo-

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[2] Petitioner incorrectly characterizes (Pet. 9) the decision in *United States* v. *Goodrich*, 493 F.2d 390, 393 (9th Cir. 1974). The language cited by petitioner as the Ninth Circuit's holding in *Goodrich* is in fact a recitation by that court of petitioner's argument based upon state case law authorities. In *Goodrich*, the indictment charged that the offense occurred "on" a specific date, rather than, as here, that the offense occurred "on or about" that date. Accordingly, the *Goodrich* court had no occasion to address the question of whether a trial court must instruct the jury as to a specific date rather than giving an "on or about" instruction when an alibi defense is raised.

ber 20 in the charge. Pet. App. 8a. The "on or about" language used in the charge, coupled with the evidence and testimony presented at the Article 32 hearing, made clear the period during which the government alleged that the offense occurred. Pet. App. 8a. The pretrial statements in which Cooper and Brownell initially reported the offense were made on October 20, 1989, and refer to the rape as having occurred some three weeks earlier. *Id.* at 8a-9a & n.2. Therefore, the statements put the defendant on notice that the rape could not have occurred on October 20, 1989, and that the government was not claiming that it had.

Finally, petitioner's conduct of the trial further demonstrated that his defense was not prejudiced. As the Court of Military Appeals observed, applicable rules of procedure provide that "[i]f the defense needs more detail as to the * * * date * * * of the offense * * * it should request a bill of particulars." Rule for Courts-Martial 701(b)(1), Discussion; see Pet. App. 9a. Petitioner did not move for a more specific charge, nor did he request a continuance during trial to prepare his response to any unexpected evidence, *Id.* at 9a, 14a, factors that support the conclusion that he was not prejudiced. See *United States* v. *Somers*, 496 F.2d 723, 746 & n.42 (3d Cir. 1974).

4. Petitioner contends that some state courts have found that the date of an offense becomes material when an alibi defense is presented. Pet. App. 10a-12a. Many of those cases, however, do not announce a *per se* rule, but review the facts to determine whether time is material. That approach is similar to the approach taken by federal courts in their fact-based prejudice test. Moreover, none of the cases involved a factual situation in which the risk of unfair surprise was as illusory as it was in this case. Here, the offense was charged as occurring "on or about"

a certain date, the pretrial evidence available to petitioner set that date with reasonable certainty, and petitioner presented an alibi defense for a date on which the pretrial hearing evidence showed that it could not have occurred. Finally, none of the state cases cited by petitioner (Pet. 10-12) applied principles of federal law. Accordingly, there is no conflict between the state court decisions cited by petitioner and the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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